Petition

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

ERNESTO ZARAGOZA Y., Petitioner

v.

THE UNITED STATES OF AMERICA; JOHN DOE WRAY, Customs Supervisor; ADELE CORP, as heir of the Estate of Brian Corp, and CRYDERMAN AIR SERVICE, INC., Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the delay of fifteen months by the Government in commencing proceedings for forfeiture of an aircraft, in which Petitioner had a chattel mortgage interest, violated customs statutes and Petitioner's Fifth Amendment rights to due process, thereby precluding forfeiture of his interest in the aircraft?

2. Whether a chattel mortgagee who established that he was unaware of and uninvolved in any unlawful use of property in which he holds a chattel mortgage interest is protected by virtue of the Fifth Amendment to the Constitution from forfeiture of his interest, pursuant to this Court's statement in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), and, if so, does the record in this case contain any support for the contrary conclusion by the courts below?

3. Whether a District Court has jurisdiction of forfeiture proceedings over property which is not within its territorial jurisdiction when the proceedings in admiralty, as required for forfeiture of property, are commenced?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

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ON WRIT OF CERTIORARI TO
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Petitioner Ernesto Zaragoza Y., respectfully requests this Court to issue its Writ of Certiorari to review the decision by the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit, Appendix A, infra, is unreported. The Order of the Sixth Circuit denying rehearing in this case, Appendix B, infra, is also unreported. The Order of the United States District Court for the Western District of Tennessee, dated

31 August, 1979, Appendix C, infra, is reported at 475 F. Supp. 1056. The opinion of the United States District Court for the Western District of Tennessee, dated December 12, 1979, Appendix D, infra, is reported at 525 F. Supp. 13.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was filed October 29, 1981. A timely Petition for Rehearing was filed on 11 November, 1981, and was denied by the Sixth Circuit on the third day of December, 1981. This Petition is timely filed within ninety days of that date. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 19, United States Code, §1594, provides, in pertinent part:

"Whenever a vessel or vehicle, or the owner or master, conductor, driver, or other person in charge thereof, has become subject to a penalty for violation of the customs-revenue laws of the United States, such vessel or vehicle shall be held for the payment of such penalty and may be seized and proceeded against summarily by libel to recover the same . . ."

Title 19, United States Code, §1602, provides, in pertinent part:

"It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage subject to seizure for violation of the customs laws, to report every such seizure immediately to the appropriate customs officer for the district in which such violation occurred, . . . and to report immediately to such customs officer every violation of the customs laws."

Title 19, United States Code, §1603, provides, in pertinent part:

"Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs laws is discovered, and legal proceedings by the United States Attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report such seizure for violation to the United States Attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction."

Title 19, United States Code, §1604, provides, in pertinent part:

> "It shall be the duty of every United States district attorney immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and, if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case . . ."

Title 28, United States Code, §2461(b), provides:

> "Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress . . . in cases of seizure on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty."

Title 28, United States Code, §1395(b), specifies:

> "A civil proceeding for the forfeiture of property may be prosecuted in any district where such property is found."

Title 19, United States Code, §1605, provides, in pertinent part:

> "All vessels . . . seized under the provisions of the customs laws . . . shall be placed and remain in the custody of the appropriate customs officer for the district in which the seizure was made to await disposition according to law.

> Pending such disposition, the property shall be stored in such place as, in the customs officer's opinion, is most convenient and appropriate with due regard to the expense involved, whether or not the place of storage is within the judicial district or the customs collection district in which the property was seized; and storage of the property outside the judicial district or customs collection district in which it was seized shall in no way affect the jurisdiction of the court which would otherwise have jurisdiction over such property."

STATEMENT OF THE CASE

This case involves proceedings begun by the Government in the United States District Court for the Western District of Tennessee, to forfeit a DC-6 aircraft because of customs law violations.

Petitioner Ernesto Zaragoza is a Mexican national enjoying an excellent reputation in the United States.[1] Zaragoza's business interests consist primarily of a chain of supermarkets and a fleet of shrimp boats in Mexico. Throughout the proceedings in the District Court and before the Court of Appeals in this case,

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[1] The District Court received in evidence letters from Robert Straub, Governor of Oregon; Lewis Murphy, Mayor of Tucson, Arizona, and an Affidavit from A. Bates Butler III, an Arizona lawyer and United States Attorney in Arizona, vouching for Zaragoza's integrity and law-abiding character (see Exhibits 5, 6, 7, Appendix below, pp. 148-150).

there was never any intimation that Zaragoza was involved in or aware of any violations of the customs laws of the United States involving the aircraft, and the District Court expressly found that he was not so aware or involved.

Zaragoza's interest in the aircraft arose from the fact that he had made a loan of $125,000.00 to a friend of Zaragoza's son, named Brian Corp. This loan had been for the purpose of construction by Corp of a home in Tucson, Arizona, for speculative resale (Tr., Nov. 9, 1979, 14, 42). Corp signed and delivered a promissory note for the loan and a mortgage upon the real property where the house was being constructed in Tucson, dated March 2, 1975. Zaragoza visited the construction site on at least two, and possibly three, occasions, observing that construction was occurring and that proceeds of his loan had apparently been used for their intended purpose.

Zaragoza made the loan to Corp because his son, David, had been saved from an aircraft crash by Corp, a friend of David's (Tr., Nov. 9, 1979, 13-15).

Zaragoza received from Corp interest payments on his loan, but asked for additional collateral when

Corp fell behind in making payments on the note. On March 15, 1977, Corp signed and delivered to Zaragoza a security agreement covering the aircraft which was later seized by the Customs Service. At the time this additional security was given to Zaragoza, Corp had informed Zaragoza that he was planning to use the aircraft to haul fresh shrimp and fish to markets in Los Angeles, California, and Las Vegas, Nevada (Tr., Nov. 9, 1979, 22). A month later, the aircraft was seized by the United States Customs Service, in Memphis, Tennessee, in connection with an apparent large shipment of marijuana into the United States. Zaragoza was not to learn that the aircraft had been seized by the Customs Service until late Spring 1978 (Tr., Nov. 9, 1979, 22-24). By this time, Corp had died and Zaragoza discovered that the deed of trust on the real property given to him by Corp might not perfect an interest in the entire proceeds of sale of the house, because of a defect in Corp's title to the land.[2] Upon learning this, and consulting

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[2] Zaragoza belatedly discovered that the home was in joint tenancy, and passed to the ownership of Respondent Adele Corp upon Brian's death. Because only Brian Corp signed the mortgage, Zaragoza's mortgage was of doubtful validity once Corp had died.

with counsel in Mexico, he forwarded the security agreement upon the aircraft to the F.A.A. on June 2, 1978. The trial court felt that Zaragoza's failure to record the security agreement with the F.A.A. represented some sort of failing by Zaragoza to take all reasonable steps to prevent use of the aircraft for illegal purposes, although Zaragoza's actions were prompted by the custom in Mexico of not recording collateral instruments until problems developed, which was due in part to the high cost of recordation in Mexico and the fact that non-recordation did not affect the validity of such instruments (Tr., Nov. 9, 1979, 25-28). The trial court never indicated in what manner non-recordation of Petitioner's chattel mortgage could have made unlawful use of the aircraft more likely or possible.

When the aircraft was seized in Memphis airport, it apparently had approximately 5,000 pounds of marijuana aboard. Zaragoza was never able to challenge any of the facts underlying the claim to forfeiture, inasmuch as Corp had died before Zaragoza even became aware of the seizure of the aircraft or the issue of its possible violations of the customs laws of

the United States. Accordingly, Zaragoza never challenged the Government's entitlement to forfeiture except insofar as it affected his own chattel mortgage interest in the aircraft.

After the aircraft was seized, it was taken for storage to the Marana Air Force Base in Tucson, Arizona, long before any judicial forfeiture procedures were begun. In the meantime, a criminal investigation was begun which resulted in an indictment of Corp on July 12, 1977. In August of 1977, Corp's business petitioned the Treasury Department for remission of forfeiture under 19 U.S.C. §1618. This and a succeeding petition were denied. In June of 1978, right after he learned of the forfeiture, Zaragoza recorded his interest with the F.A.A. and, in July, he filed his own petition for remission, under the Tariff Act.

Although the pertinent provisions of the United States Code relating to customs laws require a seizing officer to report any violation of the customs laws "immediately" to the collector of customs, 19 U.S.C. §1602; and although 19 U.S.C. §1603 requires the customs collector then to report to the United States

Attorney, whereupon §1604 obliges the United States Attorney "immediately to inquire into the facts of cases reported" and "forthwith to cause a proper proceeding to be commenced and prosecuted, without delay", these forfeiture proceedings were not begun until fifteen months after the seizure, and until after Petitioner Zaragoza had filed suit in the United States District Court for the District of Arizona, seeking to foreclose his security interest in the aircraft and to obtain possession of the aircraft from the Customs Service.

The case brought by Zaragoza against the United States and against those individuals who might claim an interest in the aircraft, to foreclose his interest in it and collect upon his loan to Brian Corp, was ultimately transferred to the United States District Court for the District of Tennessee, where forfeiture proceedings had finally been begun by the U.S. Attorney. Thereupon, discovery disclosed that, after the seizure of April 26, 1977, the report required by 19 U.S.C. §1602 was not made until 5 May, 1977, and the reference of the matter to the U.S. Attorney did not occur until February 6, 1978. Thereafter, the

U.S. Attorney took no action for forfeiture until August 17, 1978. Zaragoza's contentions to the District Court were, in essence, threefold:

1. He contended that the forfeiture was invalid because of the many months of delay, relying upon the authority of cases such as United States v. One 1970 Ford Pickup, 564 F.2d 864 (9th Cir. 1977); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (4th Cir. 1974), and United States v. One Motor Yacht Named Mercury, 527 F.2d 1112 (1st Cir. 1975). These and other cases have held that, because of the harshness of forfeiture proceedings which might cut off property rights of innocent parties, the stringent reporting and prosecution requirements of 19 U.S.C. §1602 and §1604 must be strictly employed, and a comparable requirement of promptness must be imposed upon the customs collector's duty to report to the U.S. Attorney under §1603. Such cases have held that a Fifth Amendment due process violation occurs if these requirements are not met. Under these authorities, and virtually by comparison with the time delays held unconstitutional in those cited

cases, Zaragoza argued, the Government had lost its right to forfeit the property.[3]

2. Secondly, said Zaragoza, as a holder of a security interest in the aircraft, he had done all that was within his power to do, to prevent unlawful use of the aircraft, when he satisfied himself as to the bona fides of the loan itself and the application of its proceeds, had inquired into the intended use of the aircraft for shipment of fish, had taken a security interest which prohibited unlawful use of the aircraft, and where there had been no default, so that he could not exercise any personal control over the aircraft. This, he said, constitutionally prohibited the forfeiture of his interest in the aircraft, pursuant to this Court's statements in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), wherein it was intimated that forfeiture would be constitutionally

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[3] This line of due process authority derives from this Court's holding in cases such as United States v. United States Coin and Currency, 401 U.S. 715 (1971), which holds that, where property is subject to deprivation without an advance notification and opportunity to be heard, a prompt hearing is constitutionally mandated as soon as possible after the seizure or deprivation.

unacceptable as to a person who had a property interest in a vehicle subject to forfeiture, if that person was unaware of and uninvolved in the unlawful use of the vehicle (as the District Court here found), and had done all that could reasonably be expected of him to prevent unlawful use of the chattel.

The District Court concluded that, in the thirty days or so after Zaragoza acquired his chattel mortgage in the aircraft, Zaragoza had been careless and not diligent in protecting that security interest by "failing to take effective and affirmative steps to see that a properly licensed pilot operated it; that it was not involved in illegal narcotic traffic; and that it was properly registered with the United States authorities, including his security claim as collateral" (Order, 12 December, 1979, ¶7, Appendix D-7, infra). These conclusions derived from statements by the court which were totally unsupported by any evidence (id., at D-5).

3. Finally, said Zaragoza, the Western District of Tennessee had no jurisdiction to institute forfeiture proceedings (and was, thereby, also precluded from

receiving transfer of Zaragoza's action from the District of Arizona, by which he sought foreclosure of his chattel mortgage). This contention was based upon the fact that the aircraft had physically been removed from the court's territorial jurisdiction before the admiralty proceedings were begun. Admiralty proceedings require the execution of a libel of arrest upon the property within the territorial confines of the district, which had not occurred here. The District Court concluded, and the Court of Appeals agreed, that the provisions of 19 U.S.C. §1605 (preserving the jurisdiction which the court "would otherwise have" when property is stored by the customs officers) vested the Western District of Tennessee with jurisdiction to consider this forfeiture and to receive and consider Zaragoza's case.

On the matter of the delay in forfeiture proceedings, Zaragoza filed a Motion for Summary Judgment pointing out that, under the cases above cited and others, the fifteen month delay was unacceptable under any circumstances. The Government never came forward with any evidence of the reasons for its delay but, in its memoranda of law, hypothesized that

it was entitled to wait and not institute forfeiture until the remission procedures, and the criminal investigation, had been completed. (The provisions of 19 U.S.C. §1613 and §1618, by which the executive branch may remit forfeiture to an innocent party, have nothing to do with judicial forfeiture proceedings and, indeed, decisions on these matters by the Secretary of the Treasury are not reviewable by the courts. E.g., Pullman Trust & Savings Bank v. United States, 225 F. Supp. 860 (N.D. Ill. 1964).)

The trial court acknowledged the existence of due process cases requiring timely reporting and institution of proceedings, but denied Zaragoza's summary judgment motion, without requiring the Government to prove the reasons for its delay. It concluded (Order of 31 August, 1979, Appendix C-11, infra) that any delay had been adequately explained and was excused by a combination of (1) the pendency of the petitions by Corp to the Treasury Department through May 30, 1978; (2) Zaragoza's failure to provide timely notice of his own security interest (even though Zaragoza provided such notice as soon as he learned of the seizure of the aircraft), combined with

Zaragoza's own filing of a petition for remission, and (3) a conclusion that "the Government filed this forfeiture action promptly after the conclusion of the related criminal proceedings" (even though the criminal investigation had culminated in an indictment a year before the forfeiture proceedings were instituted, and the actual criminal case against Corp because of his death was not dismissed until more than a year after the forfeiture proceedings).

In its Order, the Court of Appeals held "that the delay in this case was not unreasonable under the circumstances, for the reasons set forth in Judge Wellford's Order of August 31, 1979, denying Zaragoza's motion for summary judgment" (Order, Appendix A-3, infra). The Court of Appeals also affirmed on the subject of the Calero-Toledo issue, finding that, "for the reasons stated in Judge Wellford's carefully reasoned opinion of December 12, 1979, ___ F. Supp. ___, that Zaragoza failed to prove that he exercised due diligence in preventing the illegal use of his collateral."[4] The findings of Judge

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[4] The District Court had also concluded, erroneously we believe, that Zaragoza's standing to challenge the [cont'd]

Wellford which the Circuit Court of Appeals adopted, which we have previously described, erroneously impute knowledge to Zaragoza which simply did not exist during the month's period of time when he could conceivably have taken various steps to prevent use of his collateral for illegal purposes.[5]

The trial court's jurisdiction was founded upon 28 U.S.C. §1355 and 19 U.S.C. §1595(a), with respect to the forfeiture proceedings; and for Zaragoza's

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[4] [cont'd] forfeiture had been extinguished by his failure to record the security interest. This was said to be derived from the provisions of 49 U.S.C. §1403(c). The Court of Appeals did not reach that issue and, accordingly, though we believe the finding to be error, we do not deal with it here.

[5] One such finding, that Zaragoza's son had been involved in narcotics, simply was not true. There was evidence that the son had once been arrested for possession of marijuana in Arizona, while a student there, but had been cleared entirely. Another such finding, that Zaragoza was aware of Brian Corp's involvement with narcotics came to him after the seizure of the aircraft, as a result of the case at bar. The third such finding, that the plane should properly have been registered with U.S. authorities, had no bearing one way or the other on whether illegal use could be made of the airplane. The court also concluded that Petitioner had an affirmative obligation to see that a properly licensed pilot operated the plane, but there is no indication in the record that an improperly licensed or unlicensed pilot ever did operate the plane.

action in the Arizona court, under the provisions of 28 U.S.C. §§1331, 1332(a)(2), 1356 and 1361.

REASONS FOR GRANTING THE WRIT

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THE SIXTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF AT LEAST THREE OTHER CIRCUITS WITH RESPECT TO WHAT DELAY BY THE GOVERNMENT IN BEGINNING FORFEITURE PROCEEDINGS IS PERMISSIBLE UNDER THE DUE PROCESS GUARANTEES OF THE FIFTH AMENDMENT, AND FOR WHAT REASONS.

The decision of the Sixth Circuit accepts and adopts as its own the decision by the District Court excusing fifteen months of delay in instituting forfeiture proceedings, because of a combination of three reasons -- the pendency of petitions for remission of forfeiture, the existence of a criminal prosecution of Brian Corp, and the failure of Zaragoza to, in effect, come forward and claim his right to the property. This decision conflicts with cases from at least three circuits holding that none of these reasons is acceptable to explain such lengthy periods of delay in forfeiture. Even those circuits which allow some delay for investigation for the consideration of remission place a burden upon the Government to explain that

delay, which was not complied with in these forfeiture proceedings.

The case involves important due process claims arising from this Court's holding in United States v. United States Coin and Currency, 401 U.S. 715 (1971), and United States v. Thirty-Seven (37) Photographs, 402 U.S. 363 (1971), that, where property may be subject to seizure by the Government, due process requires the prompt giving of notice and opportunity to be heard, at least very shortly after the seizure, in those instances where it is not required beforehand.

A considerable body of case law has developed in the Courts of Appeal and the District Courts, applying these principles as a matter of Fifth Amendment constitutional right, and statutory gloss, for instances like this one in which customs law violations prompt the Government to seize and forfeit instrumentalities of the violation.

As we have already described in the Statement of the Case, under the procedures invoked here, the Government was required to make "immediate" inquiries and reports, and to institute any forfeiture

proceedings "forthwith" and to prosecute them "without delay". 19 U.S.C. §1602-1604. In this case, by answer to interrogatories, the Government acknowledged that delay by the customs officials occupied almost ten months and that of the U.S. Attorney another five. The District Court never required any trial, evidentiary hearing or other factual explanation of why these delays occurred. Examining the cases on this subject demonstrates that this fifteen month delay by itself violates statute and constitution, as established by other cases. United States v. One Motor Yacht Named Mercury, 527 F.2d 1112 (1st Cir. 1975) (thirteen months delay held undue -- proceedings properly dismissed); United States v. One 1970 Ford Pickup, 564 F.2d 864 (9th Cir. 1977) (eleven months delay "clearly falls outside of any time period permissible under the statutory scheme"); Sarkisian v. United States, 472 F.2d 468 (10th Cir. 1973), cert. denied, 414 U.S. 976 (1973) (nine months delay improper).

As we have noted, the Sixth Circuit adopted the District Court's supposition of the Government's reasons for the delay, finding them to be acceptable.

Those reasons have been disapproved by other Courts of Appeal. The Ninth Circuit has clearly held in United States v. $8,850.00, 645 F.2d 836 (9th Cir. 1981), that neither administrative proceedings nor criminal investigations can justify delay by the Government when the necessary elements of a forfeiture action were established at the time the property was seized. The administrative proceedings referred to are the options of a claimant to file a petition with the Treasury Department seeking its discretionary remission of the right to forfeit the property. Most of the cases on the subject flatly hold that a property owner cannot be penalized by resorting to this discretionary procedure, as to which courts have no power of review, revision or supervision. United States v. 8 Rhodesian Stone Statues, 449 F. Supp. 193 (C.D. Cal. 1978); Boston v. Stephens, 395 F. Supp. 1000 (S.D. Ohio 1975); United States v. A Quantity of Gold Jewelry, 379 F. Supp. 283 (C.D. Cal. 1974); United States v. One 1970 Ford Pickup, supra.

Other circuits find that a reasonable, but not an indefinite, delay may be permissible while the Government considers a petition for remission, but places

upon the Government the burden of proving that its delay was reasonable. White v. Acree, 594 F.2d 1385 (10th Cir. 1979); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (4th Cir. 1974); United States v. One Motor Yacht Named Mercury, supra. But the Sixth Circuit has not even followed those cases, inasmuch as it did not require, nor disapprove of the District Court's failure to require, the Government to prove the reasons for its delay. Nor did either District Court nor Appellate Court give any critical examination to the length of the delay or require the Government to explain it. All that occurred was that the summary judgment motion of the claimant on this subject was denied.

The Government argued below that Petitioner could not claim, in any event, that the Government lost its right to forfeit the aircraft in derogation of his chattel mortgage, unless he could prove that the fifteen months delay prejudiced him. On the issue of prejudice the courts are somewhat divided. Most hold that prejudice is irrelevant to a constitutional violation, while others find it to be a necessary element. United States v. $8,850.00, supra; United States v. 8

Rhodesian Stone Statues, supra; United States v. One 1970 Ford Pickup, supra (all holding that no proof of prejudice is required to sustain the property owner's claim of due process violation by virtue of the delay). See White v. Acree, supra, implying that prejudice must indeed exist.

Regardless, this Petitioner had prejudice to tender to the District Court, had the District Court ever gotten to the point of conducting a trial. His alternate collateral, the mortgage upon the house for which the loan proceeds were given, was affected by Corp's death (the home was in joint tenancy and, upon his death, ownership evolved upon the joint tenant who had not signed the mortgage). Had he known that his chattel mortgage in the DC-6 was jeopardized, while Corp was still alive, Petitioner could have enforced his realty mortgage at a time when its validity was not in doubt. In addition, Corp's death caused Petitioner to be prejudiced in his ability to contest the forfeiture proceedings, for, of course, he was not involved in, aware of or in any way able to determine whether forfeiture was

established. He simply had to yield to the Government's position on this point, by virtue of the delay.

The rulings below clearly contradict opinions of all the other circuits, to a greater or lesser extent. At the same time, this case would give an occasion to harmonize the precedents from the various circuits with respect to what, if any, effect there may be by virtue of the pendency of remission proceedings, upon the Government's obligations under statute and constitution promptly to institute forfeiture proceedings; to determine what, if any, prejudice need be shown by virtue of any delays occasioned; to specify whether it is the Government or the claimant which bears the responsibility of establishing the requisite elements of a due process violation in this field, by which the Government would be prohibited to forfeit out a property owner's interest in the property. See United States v. $8,850.00, supra (Alarcon, J., dissenting).

This Court has recognized, in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), that the very nature of the Government's powers of forfeiture in cases like this is harsh and foreign to all

traditional notions of due process and legal responsibility based upon fault; albeit, such forfeiture proceedings are historically established. That is all the more reason for the paying of careful attention to the statutory requirements of prompt procedure, the constitutional protections for the same, and the development of a clear, consistent jurisprudence on the subject in this area of frequent litigation.

II

THE CASE INVOLVES IMPORTANT CONSIDERATIONS OF WHEN THE PROPERTY RIGHTS OF INNOCENT PARTIES WHO WERE UNINVOLVED IN, OR UNAWARE OF, USE OF THAT PROPERTY IN CONTRAVENTION OF CUSTOMS LAWS MAY BE DEPRIVED OF THAT PROPERTY BY FORFEITURE PROCEEDINGS.

The doctrine of Calero-Toledo[6] ought to be developed, by the decision of this case.

The District Court, and the Sixth Circuit, agreed that Petitioner was unaware of any unlawful use of the aircraft, and uninvolved in any violations of the law. It recognized that he had a valid security interest in the aircraft. It acknowledged that

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6 416 U.S. 663 (1974).

his security agreement, specifying the nature of his chattel mortgage, and his rights and remedies prohibited the owner from operating the craft in violation of any law.

In Calero-Toledo, this Court said:

> "It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subject to forfeiture had been taken from him without his privity or consent . . . Similarly, the same might be said of an owner who proved not only that he was uninvolved in or unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." 416 U.S. at 689-90 (citations omitted).

By its adoption of the District Court opinion, the Sixth Circuit accepted the following findings which are obviously insufficient under any elaboration of the doctrine of Calero-Toledo that this Court might express.

The facts found by the District Court to support its conclusion in this aspect of the case are:

It found "Zaragoza attempted to place no restriction on Corp's use of the airplane even though he was aware of his son's prior involvement in drugs [although there had never been any such finding of

prior involvement] and his continuing close association with Corp, whose means of livelihood were, at best, doubtful [this statement is totally without any support in the record]." Appendix D-4, infra.

The court also found that Petitioner "made no effort to check on the status of the plane after he knew Corp as a pilot had been involved in difficulty with the narcotics law . . . [but such knowledge only came to Petitioner's attention after the aircraft had been seized, and his knowledge of the seizure of the aircraft he held a mortgage on arose after Corp was dead, and shortly before Petitioner filed his petition for remission]."

The Court noted that Zaragoza "did not even investigate to determine if Corp was the owner of the aircraft, or whether there was a proper transfer of ownership to him or his designee . . ." (The significance of this finding is uncertain; at all odds, Corp did obtain ownership of the aircraft and the trial court found that Petitioner had a valid security interest in it.)

Finally, the Court further concluded, "nor did Zaragoza check the status of Corp's pilot license to

discover that Corp was not rated to fly the DC-6 or to instruct his son, David, in flying an aircraft." Appendix D-5, infra. [Whether Corp was licensed to fly a DC-6 or to instruct Petitioner's son, in the United States, was unclear in the record; but what was clear was Zaragoza's testimony that he knew Corp to be properly licensed in Mexico. (Tr., Nov. 9, 1979, 40).]

It is appropriate for this Court to decide whether or not its statement in Calero-Toledo, supra, about the rights of innocent and uninvolved parties, is to be given effect. We think there is no real pertinence to any of the above findings to a rule such as this Court hypothesized in Calero-Toledo. In any event, the nature of the actions of an innocent mortgagee which will suffice to bring him within the protection of this Court's statements in Calero-Toledo is an important decision and appropriate for this Court to resolve, particularly in light of the due process arguments raised in Part I above, and the seemingly plain jurisdictional deficiency to which we shall now turn.

III

THE JURISDICTIONAL DECISION OF THE COURTS BELOW PLAINLY CONFLICTS WITH ESTABLISHED ADMIRALTY LAW AND LAW FROM OTHER CIRCUITS.

The opinion below seems to rest upon a conclusion that 19 U.S.C. §1605 vests jurisdiction, rather than saves it. But, by its terms, it only authorizes the Government to store property pending forfeiture and specifies that such storage shall "in no way affect the jurisdiction of the Court which would otherwise have jurisdiction over such property." 19 U.S.C. §1605. The extent to which such a conclusion departs from established admiralty law, and conflicts with other circuits, is most concisely demonstrated by a quotation from Platoro Limited, Inc. v. Unidentified Remains of A Vessel, 508 F.2d 1113 (5th Cir. 1975), where the court said:

> "To establish in rem jurisdiction in admiralty the res must be present in the district when the suit is filed or during the pendency of the action. Rule C(2), Supplemental Rules for Certain Admiralty and Maritime Claims provides: 'In actions in rem the complaint . . . shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action.' Rule E(3)(a) of the Supplemental Rules states: 'Process in

rem and of maritime attachment and garnishment shall be served only within the district.' The fact that the artifacts [which were the subject of admiralty proceedings] originally lay within the Southern District does not establish in rem jurisdiction. See American Bank of Wage Claims v. Registry of District Court, 431 F.2d 1215 (9th Cir. 1970). Platoro itself removed the artifacts from the Southern District of Texas long before filing the suit there, and, when the monition issued the artifacts were in the Western District of Texas.

In its jurisdictional ruling, the district court acknowledged that the artifacts were not within the Southern District. It felt, however, that this case fell within exception to the general rule that removal of the res destroys a court's jurisdictional base. Where the res is accidentally, fraudulently, or improperly removed from the district, the court's in rem jurisdiction is not destroyed. The Rio Grande, 90 U.S. (23 Wall.) 458, 23 L.Ed. 158 (1874); American Bank of Wage Claims v. Registry of District Court, supra; Martin v. The Bud, 172 F.2d 295 (9th Cir. 1949). The exception cannot apply, however, where the district court did not originally establish its in rem jurisdiction." Platoro Limited, Inc. v. Unidentified Remains of A Vessel, 508 F.2d 1113, 1115-16 (5th Cir. 1975).

Like the "fraudulent removal" exception to admiralty territorial jurisdiction, the saving provisions of §1605 would seem not to apply where, as here, there was never any process -- libel of arrest -- carried out upon the property before it was removed from the Western District of Tennessee.

Thus, the jurisdictional ruling of the Sixth Circuit, and its construction of the provisions of 19 U.S.C. §1605, are a substantial departure from established case law and should be reviewed.[7]

CONCLUSION

For the above reasons, it is respectfully requested that this Court grant certiorari and review the opinion below.

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Tucson, Arizona 85702-2268
(602) 622-3531
Counsel for Petitioner

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[7] The Government will no doubt argue that the purpose of §1605 is to prevent fraudulent selection of forum by the Government, by means of moving property from one jurisdiction to another. We think that purpose is as well served by the neutral application of the statute -- if a bona fide selection of a storage location has been made, there is no reason for the property not to be subject to admiralty jurisdiction in the district where the property is stored.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

V.

ONE 1951 DOUGLAS DC-6 AIRCRAFT, ET AL.,

Defendants

ERNESTO ZARAGOZA Y.,

Claimant-Appellant

- -

ERNESTO ZARAGOZA Y.,

Plaintiff-Appellant

V.

UNITED STATES OF AMERICA; JOHN DOE WRAY, U. S. Customs Service Regional Supervisor; Adele Corp, heir of estate of Bryan Corp; Cryderman Air Service, Inc.,

Defendant-Appellees

/

O R D E R

[Filed Oct. 24, 1981]

Before: EDWARDS, Chief Judge; ENGEL and MARTIN, Circuit Judges

Ernesto Zaragoza Y. appeals from the judgment of the district court, Judge Harry W. Wellford, authorizing and approving the forfeiture of an airplane in

which he claims a security interest. United States Customs agents seized the plane at Memphis International Airport on April 26, 1977. It is undisputed that the plane contained 5,420 pounds of marijuana when seized, and that the plane would be subject to forfeiture under 19 U.S.C. § 1595a(a) but for Zaragoza's security interest. Zaragoza appeals on three grounds. First, he claims that venue was not proper in the Western District of Tennessee under 28 U.S.C. § 1395(b) because the plane had been transferred by the government for storage to Tucson, Arizona before the forfeiture action was commenced. The court is of the opinion that 19 U.S.C. § 1605, which authorizes the kind of storage transfer made in this case, permits forfeiture actions to be brought in the district where the property was seized regardless of where the customs officer chooses to store the property after seizure.

Zaragoza's second claim is that the fifteen months which elapsed between the seizure of the airplane and the initiation of the forfeiture action constituted unreasonable delay violative of Zaragoza's procedural due process rights and 19 U.S.C. § 1604. The court

holds that the delay in this case was not unreasonable under the circumstances, for the reasons set forth in Judge Wellford's order of August 31, 1979 denying Zaragoza's motion for summary judgment. _____ F.Supp. _____.

Finally, Zaragoza argues that forfeiture of the airplane would deprive him of his security interest in the plane and thereby abridge his substantive due process rights. He relies entirely upon Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1973), which hints that the owner of property subject to statutory forfeiture might have a constitutional defense to the forfeiture if he "prove[s] not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." Id. at 689. We hold, for the reasons stated in Judge Wellford's carefully reasoned opinion of December 12, 1979, ___ F.Supp. _____, that Zaragoza failed to prove that he exercised due diligence in preventing the illegal use of his collateral.

Zaragoza, therefore, cannot stand under the constitutional umbrella of Calero-Toledo.[1] Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

Clerk

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[1] Because we agree with Judge Wellford's holding that Zaragoza's claim does not meet the standard set forth in Calero-Toledo, we express no opinion on the alternate holding in Conclusion numbers 5 and 6 of his opinion, that Zaragoza's failure to perfect his security interest under 49 U.S.C. § 1403(c) until after the seizure of the plane precludes him from raising the Calero-Toledo defense. Likewise, we express no view on the more basic question of whether the "innocent owner" defense suggested by Calero-Toledo is available to lienholders at all.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee ORDER

V. [Filed Dec. 3, 1981]

ONE 1951 DOUGLAS DC-6 AIRCRAFT, ET AL., ERNESTO ZARAGOZA Y.

Claimant-Appellant

/

Before: EDWARDS, Chief Judge, ENGEL and MARTIN, Circuit Judges

Appellant having filed a petition for rehearing with this court, and this court having considered said petition and finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	NO. 78-2418
	)	
v.	)	
	)	
ONE 1951 DOUGLAS DC-6 AIRCRAFT, et al.,	)	
	)	
Defendants.	)	
	)	
ERNESTO ZARAGOZA Y.,	)	
	)	
Plaintiff,	)	NO. 79-2118-W
	)	
v.	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	

ORDER

The United States brings civil action No. 78-2418 under 19 USC § 1591a for forfeiture of an aircraft, weapons and ammunition allegedly employed by Brian J. Corp[1] and others in a federal criminal offense.

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1 Corp is now allegedly deceased.

Although the answer of Corp's representative denies the government's claim for forfeiture, the record in the related criminal case establishes as against Corp's successors and all other persons that the aircraft and tackle were lawfully seized by federal officers at Memphis International Airport on April 26, 1977. See 19 USC § 1615; United States v. Corp, et al., No. 77-20118 (November 23, 1977); and the Order of May 31, 1979, in this cause. The weapons and ammunition have been decreed forfeited and have reportedly been delivered to Customs authorities in New Orleans, Louisiana.

The right of the United States to forfeit and sell the DC-6 aircraft is challenged on constitutional and statutory grounds by Ernesto Zaragoza Y., a Mexican citizen. Zaragoza filed a civil action and petition for mandamus in the District of Arizona against the United States, an unidentified Customs Officer, Corp's legal heir, and a corporation allegedly holding title to the aircraft. The complaint alleges that Corp granted Zaragoza a security interest in the aircraft; that $60,000 is owing from Corp's successors on an underlying note; that Zaragoza was uninvolved in the

aircraft's illicit use and sought to avoid the same; and that the continued retention and forfeiture of the aircraft by the government will deprive him of a contstitutionally-protected [sic] property interest without due process of law.

The government moved to dismiss Zaragoza's complaint for lack of subject-matter jurisdiction. Zaragoza opposed and moved for summary judgment on the ground that the government's delay in commencing the forfeiture proceedings was unconstitutional as a matter of law. Although not a party to the proceedings in this District, Zaragoza moved to dismiss the forfeiture action or transfer venue thereof to the District of Arizona. The Arizona Court declined to rule on the motions before it and transferred Zaragoza's action to this District. This Court accepted transfer and denied Zaragoza's motions in the forfeiture action. Memoranda on the jurisdictional and constitutional issues have been filed and considered.

At the outset, the Court must question its jurisdiction even to entertain Zaragoza's statutory and constitutional claims. As noted tentatively in prior orders, Congress has provided a statutory scheme for

the disposition of rights in seized property, allocating jurisdiction between executive and judicial agencies for different purposes. The Tariff Act of 1980, 19 USC §§ 1202 et seq., requires that seizures of property under the Customs laws be reported "immediately" to Customs officials and "promptly" to the United States Attorney for the district of seizure or violation. §§ 1602, 1603. The United States Attorney must then "immediately" investigate the facts of the case and, if appropriate, commence "forthwith" a judicial action to forfeit the property. § 1604. The judgment in such an action vests full ownership of the property in the United States for sale and disposition of proceeds by the Secretary of the Treasury. §§ 1595a, 1613. See also United States v. Stowell, 133 U.S. 1 (1980); Ivers v. United States, 581 F.2d 1362, 1367 (9th Cir. 1978).[2]

At any time between seizure and sale of forfeited property, any interest-holder may petition the Secretary of the Treasury for remission or mitigation of

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[2] Summary procedures are also established for property valued at $10,000 or less or subject to perish, §§ 1607, 1609, 1612, but are inapplicable here.

the forfeiture. If the Secretary or his delegate finds that the property was implicated in criminal activity without unlawful intent or willful negligence on the part of the petitioner, he may afford relief. § 1618. Even after disposition of the property, an innocent interest-holder may obtain remission of an appropriate share of the sale proceeds on the same grounds by petition to the Treasury Department. § 1613.

If an interest-holder files a claim for seized property with Customs prior to the judicial forfeiture proceeding, the Tariff Act provides that his claim comes on before the District Court in that proceeding, with the burden of proving the claim upon the interest-holder. § 1615. Judicial jurisdiction over the competing claims of government and interest-holder in this proceeding traditionally has been limited to determining whether the defendant vessel or property was in fact involved in criminal activity; for the Act prescribes forfeiture upon a showing of probable cause that property is employed "in any way" in a Customs violation. 19 USC § 1595a; The Squanto, 13 F.2d 548 (2d Cir. 1926); United States v. One 1975 Mercedes 280S, 590 F.2d 199 (6th Cir. 1978). Any remission in

favor of an innocent interest-holder has been deemed solely an "act of grace" by the executive branch, and the weight of authority continues to be that a decision by Treasury officials to deny a petition under 19 USC §§ 1618 or 1613 is not subject to judicial review. United States v. One 1961 Cadillac, 337 F.2d 730, 733 (6th Cir. 1964); United States v. One 1972 Mercedes-Benz 250, 545 F.2d 1233, 1236 (9th Cir. 1976).

At the same time, however, the Supreme Court has postulated circumstances under which the due process guarantee might require relief from a criminal forfeiture, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974); and there is emerging lower court authority that claimant/interest-hc'ders may challenge the government's compliance with forfeiture procedures on statutory and constitutional grounds, either in defending the forfeiture action itself, United States v. Edwards, 368 F.2d 722 (4th Cir. 1966); United States v. One 1970 Buick Riviera, 463 F.2d 1168 (5th Cir. 1972); United States v. One 1972 Chevrolet Blazer Vehicle, 563 F.2d 1386 (9th Cir. 1977); or by separate action against the government. States Marine Lines v. Shultz, 498 F.2d 1146

(4th Cir. 1974); Lee v. Thornton, 538 F.2d 27 (2d Cir. 1976), rev'd on other grounds, 420 U.S. 139. The Supreme Court has approved such review in dicta. United States v. U. S. Coin and Currency, 401 U.S. 715, 721 (1971) (citing United States v. Edwards, supra); Calero-Toledo v. Pearson Yacht Leasing Co., supra, 416 U.S. at 677 n. 11 (jurisdiction under 28 USC § 1331).[3]

Based on the foregoing authorities, the Court concludes that Zaragoza may at least assert his statutory and constitutional claims in defense of the government's forfeiture action in this Court. In view of this finding, the motion to dismiss filed by the government in the Arizona court is denied. Until such time as Zaragoza establishes a valid constitutional defense to forfeiture, the Court need not decide whether there is pendent or diversity jurisdiction to adjudicate his claims against Corp's estate and the

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[3] Outside of the context of criminal forfeiture, there is authority for direct actions against government officials under the Due Process Clause. Chicago B & Q R.R. v. City of Chicago, 166 U.S. 276 (1897); Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911); Davis v. Passman, ___ U.S. ___, 47 U.S.L.W. 4643 (1979).

purported title-holder of the aircraft. Zaragoza's additional claims under 28 USC §§ 1356 and 1361 are duplicitous and need not be considered independently.

Zaragoza asserts two different constitutional arguments for denial of forfeiture to the government and the substitution of a judicial sale to satisfy his security interest. The Treasury Department has already considered and rejected petitions from both Zaragoza and the purported owner of the aircraft. Zaragoza's first argument, then, is solely procedural: that the government so delayed its investigation and institution of forfeiture proceedings that he has been deprived of a right to prompt adjudication of his property interest. This argument was the basis for Zaragoza's motion for summary judgment in the Arizona district court. Upon review of the facts and authorities submitted, the Court finds no merit in this argument.

The Supreme Court has identified strict due process requirements in the seizure and forfeiture of communicative material also protected by the First Amendment, United States v. 37 Photographs, 402

U.S. 363 (1971), but has thus far distinguished forfeiture proceedings from the operation of general property protections in other areas. United States v. U. S. Coin and Currency, supra; Calero-Toledo v. Pearson Yacht Leasing Co., supra. Forfeiture has been denied on the ground of unreasonable delay, but none of the cases cited by Zaragoza would bar the government's action in this case.

This forfeiture grows out of extended criminal proceedings against the purported owner of the property and others. See Ivers v. United States, supra, 581 F.2d at 1372. The government asserts that when the aircraft was seized on April 26, 1977, both the Bureau of Customs and the United States Attorney for this District were notified immediately as prescribed in 19 USC §§ 1602, 1603. Zaragoza has not rebutted this contention. Corp, who was arrested by Memphis Police officers concurrently with the seizure, had immediate notice thereof. On June 6, 1977, the Bureau of Customs formally notified Corp's business of the seizure and of administrative procedures for asserting any rights in the aircraft. Zaragoza was not similarly notified because, as he

concedes, his security interest in the aircraft was not filed with the Federal Aviation Administration and thus was not known to the government.

Federal officers obtained a warrant for Corp's arrest on June 15, 1977, and an indictment against him on July 12, 1977. On August 8, Corp's business petitioned the Treasury Department for remission of forfeiture under 19 USC § 1618. From August 12 through November 14, Corp filed and briefed in this Court a motion to suppress evidence obtained in the seizure, which motion was denied on November 23.

On January 26, 1978, the Treasury Department denied Corp's petition to release the aircraft. On March 1, 1978, Corp's attorney filed a protest of this ruling, which was reaffirmed on May 30. Meanwhile, on May 5, criminal proceedings were suspended on the suggestion of Corp's attorney that he had suffered death outside the country.

On June 2, 1978, fifteen months after creation of the alleged security interest, and nearly as long after the seizure, Zaragoza filed his chattel mortgage with the FAA. On July 6, he filed his own petition under

the Tariff Act, necessitating an entirely new administrative investigation. Even so, the United States Attorney proceeded wtih this forfeiture action on August 17.

Zaragoza's own failure to provide timely public notice of his security interest and his own delay in asserting that interest significantly distinguish this case from United States v. One 1970 Ford Pickup, 564 F.2d 864 (9th Cir. 1977), and the other cases cited by him. Although pending administrative proceedings may not in some circumstances justify government delay in seeking judicial condemnation, e.g. Boston v. Stephens, 395 F.Supp. 1000 (S.D. Ohio 1975): even a per se rule to this effect would not bar forfeiture here: the government filed this forfeiture action promptly after the conclusion of the related criminal proceedings, without waiting for the Treasury Department to act upon Zaragoza's petition. Despite delay occasioned earlier by the criminal proceedings and Corp's own petition, Zaragoza had not recorded his security interest at that time and cannot complain of those events. See also White v. Acree, 594 F.2d 1385 (10th Cir. 1979); United States v. One

1973 Ford LTD, 409 F.Supp. 741 (D. Nev. 1976). Under the circumstances indicated, the Court finds no unconstitutional delay and no ground for a summary judgment barring forfeiture.

Zaragoza's remaining argument is that forfeiture of the aircraft will extinguish his security interest in violation of substantive due process rights. The Supreme Court has upheld the operation of criminal forfeiture statutes against the property rights of innocent owners or interest-holders. In Calero-Toledo v. Pearson Yacht Leasing Co., supra, the court held that the seizure and forfeiture of a leased yacht on which the lessee stored a small quantity of marijuana did not unconstitutionally condemn the property of a lessor who "was in no way involved in the criminal enterprise...and had no knowledge that its property was being used...in violation of [law]." 416 U.S. at 668. Sufficient justification for the infringement was found in the prevention of "further illicit use of the conveyance" and in the deterrent effect of forfeiture. 416 U.S. at 687-88. Still, the court noted that the identified justifications obtain only where "the means that are prescribed for the prevention of a forfeiture

may be employed," and postulated two circumstances in which forfeiture might be "unduly oppressive":

> It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subject to forfeiture had been taken from him without his privity or consent... Similarly, the same might be said of an owner who proved not only that he was uninvolved in or unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property.

416 U.S. at 689-90 (citations omitted).

Zaragoza's complaint specifically alleges that he "was uninvolved in and unaware of any wrongful activity by which the said aircraft could be subject to... forfeiture" and "took all steps reasonably available to him to prevent any illicit or proscribed use of his property." As noted previously, the Treasury Department has already considered and rejected essentially the same claim, and its finding thereon cannot be appealed to this Court. Moreover, with the present record indicating that Zaragoza had not even perfected his security interest at the time of the aircraft's seizure, the Court has some doubt as to whether he can now substantiate such a claim or that he acted with reasonable dispatch. Zaragoza's own

pleadings indicate indeed that Corp had not been granted title to the DC-6 on the date he purported to grant Zaragoza's security interest therein. There is accordingly some doubt as to whether Zarazoga [sic] has any substantial property interest to assert or had such an interest at the time of seizure. See Affidavit of Cryderman Air Service, Inc.; 49 USC § 1403(c). In view of the authorities cited previously, however, the Court concludes that prior to final judgment of forfeiture a hearing should be held to afford Zaragoza an opportunity to assert the narrow constitutional defense to forfeiture established in Calero-Toledo, supra, and pleaded in his complaint. Since this action proceeds under § 1595a of the Tariff Act, § 1615 applies and places the burden of establishing a defense to forfeiture upon the interest-holder. See United States v. One 1975 Mercedes 280S, supra; United States v. One 1970 Pontiac GTO 2-door Hardtop, 529 F.2d 65 (9th Cir. 1976).

The hearing is scheduled for Friday, October 5, 1979, at 10:00 a.m.

It is so ORDERED this 31st day of August, 1979.

HARRY W. WELLFORD, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	NO. 78-2418
	)	
v.	)	
	)	
ONE 1951 DOUGLAS DC-6 AIRCRAFT, et al.,	)	
	)	
	)	
Defendants.	)	
	)	
ERNESTO ZARAGOZA Y.,	)	
	)	
Plaintiff,	)	NO. 79-2118
	)	
v.	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

FINDINGS OF FACT

Ernesto Zaragoza, a Mexican national and a substantial entrepreneur, made loans totalling $125,000 to Brian Corp, advancing the money to him in installments prior to March 2, 1975, for the purpose of

construction by Corp of a home in Tucson, Arizona.[1] Corp signed and delivered to Zaragoza a promissory note, dated March 2, 1975, and a Deed of Trust dated March 2, 1975, upon the real property where the house was constructed. Zaragoza subsequently visited the site of construction, but only on one or two occasions, and found that construction was taking place at the site. The loan by Zaragoza to Corp was prompted by the request of Zaragoza's son, David, who had been taking flying lessons from Corp during his high school days. Corp and David Zaragoza had been involved in an airplane crash at Guaymas, Mexico, in which the father believed Corp had been instrumental in saving his son's life.

Corp fell behind in making note payments when due, and Zaragoza requested further collateral. It was not until March 15, 1977, that Corp signed and delivered to Zaragoza a security agreement covering the DC-6A Aircraft N2901F, which is the subject of this action. Corp had obtained this plane from

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[1] Zaragoza stated that he loaned Corp $65,000 on March 2, 1975, and subsequently loaned Corp an additional $60,000.

Cryderman Air Service, Inc., and placed it in the name of Executive Leasing.

Zaragoza said Corp told him he was going to haul fresh fish and shrimp to Los Angeles and Las Vegas; Zaragoza was going to help Corp get started in the business because he had shrimp interests in Mexico. Zaragoza testified he had no knowledge of Corp's involvement in drugs, although his son, David, was arrested in 1974 for possession of marijuana for sale while in Tucson, and he knew that Corp by June or July of 1977 had been hired as a pilot and had been "in trouble" with the narcotics authorities. Zaragoza, however, stated he first learned that Corp had used the airplane in drug traffic in April, 1978, at the funeral for Corp and David Zaragoza, killed in a mysterious plane crash in Mexico.

Ernesto Zaragoza himself was not involved in any utilization of the said DC-6 Aircraft for any customs law violations or other illegal activities, but it seems likely that his son may have been. Zaragoza did not learn that the DC-6 Aircraft upon which he was given

security interest had been seized by the United States Government until the Spring of 1978.

Later, in 1978, Zaragoza learned that the Deed of Trust given to him on the Arizona land (the house site) might not perfect an interest in the entire proceeds of any sale of the house because title to same was held by Corp in joint tenancy with his mother, with right of survivorship. Upon consulting with a lawyer in Mexico, he then forwarded the security agreement to the FAA on June 2, 1978. Zaragoza was involved in many business activities and frequently came across the border to the United States; he was accustomed to the Mexican law with respect to recording collateral security instruments, an expensive procedure there. He claims this to be the reason he did not send the security agreement to the FAA at the time he originally received it.

The security agreement itself contains a general prohibition against the use of the collateral, the DC-6, in any manner that would violate any law.

Zaragoza attempted to place no restriction on Corp's use of the airplane even though he was aware

of his son's prior involvement in drugs and his continuing close association with Corp, whose means of livelihood were, at best, doubtful. He also made no effort to check on the status of the plane after he knew Corp as a pilot had been involved in difficulty with the narcotics laws. Zaragoza did not even investigate to determine if Corp was the owner of the aircraft, or whether there was a proper transfer of ownership to him or his designee. Nor did Zaragoza check the status of Corp's pilot license to discover that Corp was not rated to fly the DC-6 or to instruct his son, David, in flying an aircraft.

CONCLUSIONS

1. In order to prevail, Zaragoza must, among other things, establish that he was

> "uninvolved in or unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property...." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974).

2. This Court has jurisdiction to consider the claims and defenses of plaintiff Zaragoza pursuant to 28 USC § 1331.

3. Ernest Zaragoza has and had a security interest in DC-6A Aircraft No. 51-17645, Registration No. N-2901F, by virtue of the security agreement, dated March 15, 1977, to secure a prior loan.

4. Zaragoza contends that to allow the forfeiture of the DC-6 Aircraft in derogation of his security interest would deprive him of property without due process of law, in violation of the Due Process Clause of the Fifth Amendment, because of the delay by the responsible officers of the United States Customs Service and of the United States Attorney, in instituting forfeiture procedures. This Court has heretofore denied Zaragoza's summary judgment motion on that issue.

5. The non-recording of Zaragoza's security interest in the DC-6 Aircraft with the FAA after the seizure by the United States also would defeat Zaragoza's right to contest the forfeiture. Under 49 USC § 1403(c) no interest in an aircraft is valid against anyone other than the conveyor of the interest until the security interest holder records it with the FAA. The government's interest in the plane vested upon commission of the illegal act. Although

this interest will not be perfected until judicial condemnation, perfection, once obtained, relates back to the earlier vesting and avoids all interests arising in the interim. United States v. Stowell, 133 U.S. 1 (1890); Ivers v. United States, 581 F.2d 1362 (9th Cir. 1978); Simons v. United States, 541 F.2d 1351 (9th Cir. 1976).

6. The Court has found that the government seizure was proper under the probable cause test. United States v. One 1975 Mercedes 280S, 590 F.2d 196 (6th Cir. 1978). That Zaragoza's interest must yield is effectual regardless of whether he satisfied the Calero-Toledo requirement that he had no knowledge of the criminal activity and that he did everything that could reasonably be expected to prevent such activity. See 418 U.S. at 689-90.

7. Zaragoza was careless and not diligent in protecting his security interest in the plane; in failing to take effective and affirmative steps to see that a properly licensed pilot operated it; that it was not involved in illegal narcotic traffic; and that it was properly registered with United States authorities, including his security claim as collateral.

Accordingly, Zaragoza's claim of intervention must fail. The forfeiture and sale of the plane by the United States is authorized and approved.

It is so ORDERED this 12th day of December, 1979.

HARRY W. WELLFORD, JUDGE
UNITED STATES DISTRICT COURT

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Opposition

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FILED
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No. 81-1637

In the Supreme Court of the United States

OCTOBER TERM, 1981

ERNESTO ZARAGOZA Y., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1 Whether the 15-month delay between the time Customs officers seized an airplane and the time the United States Attorney filed a civil action in federal court to forfeit the plane denied petitioner his Fifth Amendment right to procedural due process.

2. Whether the court of appeals erred in upholding the finding of the district court that petitioner had not exercised due diligence in preventing the illegal use of the seized airplane.

3. Whether a civil forfeiture action is properly brought in the judicial district where the defendant airplane was seized, although the airplane has been moved to a different district for storage.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-4) is reported at 667 F. 2d 502. The opinions of the district court (Pet. App. C-1 to C-15; D-1 to D-8) are reported at 475 F. Supp. 1056 and 525 F. Supp. 13.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1981, and a petition for rehearing was denied on December 3, 1981 (Pet. App. B). The petition for a writ of certiorari was filed on March 3, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 26, 1977, a Douglas DC-6 aircraft loaded with 5,420 pounds of marijuana was seized by Customs officers at Memphis International Airport (Pet. App. A-2). The pilot, Brian Corp, was indicted for narcotics offenses

on July 12, 1977, in the United States District Court for the Western District of Tennessee. Customs officials formally notified Corp's business, Executive Leasing, of the seizure of the airplane and weapons on board and of procedures for asserting any rights it had in any of the property (Pet. App. C-9 to C-10).[1]

On August 8, 1977, Executive Leasing petitioned the Treasury Department for remission of the forfeiture under 19 U.S.C. 1618. The petition was denied on January 26, 1978 (Pet. App. C-10). On March 1, 1978, Executive Leasing filed a protest of this decision, which was reaffirmed on May 30, 1978. Meanwhile, on May 5, the criminal proceedings against Corp were dismissed on the suggestion of his attorney that Corp had died when his airplane crashed in Mexico (*ibid.*).

On June 2, 1978, two days after the denial of Executive Leasing's protest, petitioner filed a chattel mortgage with the FAA claiming a security interest in the aircraft as collateral on a $125,000 loan he had made 15 months previously to Corp.[2] One week later, the attorney for Executive Leasing notified the District Director of Customs in New Orleans that petitioner, a wealthy Mexican businessman, had a security interest in the aircraft (Pet. App. C-10). On July 6, 1978, petitioner filed his own petition for remission of the forfeiture, in which he claimed that he had a valid security interest in the aircraft and that he was unaware of its illegal use. Petitioner asserted that Corp had told him he

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[1]For all intents and purposes, Brian Corp was Executive Leasing (C.A. App. 7). ("C.A. App." refers to the joint appendix in the court of appeals.)

[2]Petitioner asserted later (Pet. 7) that his belated filing with the FAA was prompted by his discovery, after Corp's death, that there was a defect in the real property mortgage Corp had given him as the original security for the loan.

was planning to use the plane to haul fresh shrimp and fish to markets in Los Angeles and Las Vegas (Pet. App. D-3). The administrative petition was ultimately denied (*id.* at C-8).

2. On August 17, 1978, before the Treasury Department had acted upon the administrative petition, the United States Attorney filed this forfeiture action under 19 U.S.C. 1595a in the United States District Court for the Western District of Tennessee. Petitioner subsequently filed a civil action in the United States District Court for the District of Arizona seeking to compel Customs to sell the aircraft and to pay him $60,000, allegedly owed him by Corp's successors on the loan. Petitioner also moved to dismiss the forfeiture action in the Western District of Tennessee or to transfer venue to the District of Arizona. The district court in Arizona declined to rule upon these motions and transferred petitioner's action to the district court in Tennessee (Pet. App. C-2 to C-3).

The district court in Tennessee first rejected petitioner's claim that the government's delay in filing the civil forfeiture action denied his due process rights under the Fifth Amendment (Pet. App. C-8 to C-12). The court found no unwarranted delay by the government, noting that the forfeiture action was filed promptly after the conclusion of related criminal proceedings (Pet. App. C-11). The court also held that petitioner could not complain of the delay in any event because of his failure to provide timely public notice of his security interest in the aircraft and his own unjustified delay in asserting that interest (*ibid.*).

The district court also rejected petitioner's claim that forfeiture of his security interest in the airplane was unconstitutional because "he had done all that reasonably could be expected to prevent the proscribed use of his property." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974). Relying upon 49 U.S.C. 1403(c), the court

held, initially, that petitioner had no standing to contest the forfeiture because of his failure to record any security interest with the FAA prior to the seizure of the aircraft (Pet. App. D-1 to D-7).[3] The court also held that petitioner had been "careless" in failing to take "effective and affirmative steps" to insure that the aircraft was not involved in illegal narcotics trafficking and thus could not satisfy the requirements of the *Calero-Toledo* defense (*id.* at D-7).

The court of appeals affirmed (Pet. App. A-1 to A-4). The court held that under 28 U.S.C. 1395(b), venue was proper in the Western District of Tennessee as the place where the plane was seized (Pet. App. A-2).[4] Adopting the reasoning of the district court, the court of appeals also held that the delay in this case was justified (*id.* at A-2 to A-3) and that petitioner had failed to prove "due diligence in preventing the illegal use of his collateral" and therefore could claim no violation of his substantive due process rights (*id.* at A-3).

ARGUMENT

1. Petitioner first argues (Pet. 18-24) that the 15-month delay between the time the DC-6 aircraft was seized and the time the civil forfeiture action was filed denied him due process of law. Assuming that petitioner even has standing to challenge the forfeiture of the aircraft,[5] this claim is clearly without merit for the reasons stated by the courts below.

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[3]The court also noted (*id.* at C-14) that Corp did not even have title to the DC-6 on March 15, 1977, the date on which he purportedly granted petitioner a security interest in it.

[4]The airplane had been transferred to Tucson, Arizona for storage, but the court held that this action did not deprive the district court in Tennessee of authority to adjudicate this action. See 19 U.S.C. 1605.

[5]Although petitioner attempts to avoid the standing question on the basis that the court of appeals did not pass on it, the district court was plainly correct in concluding that petitioner had no legal interest in the aircraft that could be asserted against the government because he failed

The civil forfeiture action was filed only two months after petitioner came forward to assert an interest in the seized DC-6. Prior to that time, the government had no way of knowing that petitioner had any interest in the aircraft. Thus, petitioner is in no position to complain about the bulk of the delay that occurred before he recorded his security interest with the FAA.

This Court has granted our petition for a writ of certiorari in *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*, cert. granted, No. 81-1062 (Mar. 22, 1982).[6] Petitioner's due process claim, however, would not be affected by this Court's disposition of that case because petitioner's failure to come forward in a timely fashion adequately explains the delay in this case.[7] Accordingly, there is no reason to hold this case

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to record his security interest with the FAA prior to the seizure. 49 U.S.C. 1403(c). As the district court recognized (Pet. App. D-6 to D-7), the government's interest in the plane vested at the time it was used to smuggle marijuana. Although the government's interest is not perfected until judicial forfeiture proceedings have been completed, it is well settled that condemnation of the property relates back to the time the property was used illegally and avoids all interests arising in the interim. *United States* v. *Stowell*, 133 U.S. 1 (1890); *United States* v. *Currency Totalling $48,318.08*, 609 F. 2d 210, 212 (5th Cir. 1980); *Ivers* v. *United States*, 581 F. 2d 1362, 1367 (9th Cir. 1978); *Simons* v. *United States*, 541 F. 2d 1351, 1352 (9th Cir. 1976).

[6]A copy of our petition in *Eight Thousand Eight Hundred and Fifty Dollars in United States Currency* has been sent to petitioner.

[7]The courts below also relied upon the pendency of a criminal investigation to justify a portion of the delay. That issue is present in *Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*, but this is an alternative basis for decision and thus supplies no reason for holding this petition pending the Court's disposition of *Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*. In addition, although not relied upon by the court of appeals, it seems quite clear that petitioner lacks standing to challenge the forfeiture (see note 5, *supra*), which renders the delay issue in this case particularly inappropriate for this Court's review.

pending the outcome in *Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*.

2. Petitioner next argues (Pet. 25-28) that the courts below erred in finding that he had not brought himself within the narrow constitutional defense to forfeiture suggested by this Court in *Calero-Toledo* v. *Pearson Yacht Leasing Co., supra*. In this regard, petitioner contests only the fact finding of the two lower courts and accordingly presents no issue warranting review by this Court. Moreover, the record fully supports the findings below that petitioner failed to satisfy his burden under *Calero-Toledo* to show "that he had done all that reasonably could be expected to prevent the proscribed use of his property." 416 U.S. at 689. As the district court found, petitioner's son had been seriously involved with drugs and had maintained a close association with Corp, but nonetheless petitioner placed no restrictions on Corp's use of the plane (Pet. App. D-4 to D-5). In addition, petitioner never inquired about the plane even after he learned that Corp allegedly had been violating the narcotics laws (*id.* at D-5). These findings, upheld by the court of appeals as supported by substantial evidence, make clear that petitioner did not satisfy the requirements of *Calero-Toledo*, and therefore forfeiture of his security interest in the plane was constitutional.

3. Finally, petitioner contends (Pet. 29-31) that the transfer of the DC-6 aircraft to Tucson, Arizona for storage deprived the district court in Tennessee of jurisdiction over the forfeiture action. This claim is without merit.

Petitioner's argument ignores the plain language of 19 U.S.C. 1605, which states that the "storage of the property outside the judicial district or customs collection district in which it was seized shall in no way affect the jurisdiction of the court which would otherwise have jurisdiction over such

property." Absent the transfer of the property for storage, it is clear that venue would be proper in the district where the property is located after seizure. See 28 U.S.C. 1395(b).[8] Section 1605 thus allows the government to choose that jurisdiction for filing its civil forfeiture action.[9]

Since the court of appeals has reasonably interpreted Section 1605 in a way that conflicts with no decision of any other court, further review of the issue by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
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DAVID B. SMITH
Attorney

MAY 1982

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[8]Venue in *in rem* actions for forfeiture is controlled by 28 U.S.C. 1395(b), which provides that such actions may be brought "in any district where such property is found."

[9]The only case petitioner cites, *Platoro Limited, Inc.* v. *Unidentified Remains Of A Vessel*, 508 F. 2d 1113 (5th Cir. 1975), is not to the contrary. That case merely held that when a *private party* removes the property that is the subject of an *in rem* action from the judicial district in which it is originally found, before filing suit there, he thereby destroys the district court's jurisdiction. The court obviously had no occasion to interpret 19 U.S.C. 1605.

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Petitioner's Reply Brief

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NO. 81-1637

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

ERNESTO ZARAGOZA Y., Petitioner

v.

THE UNITED STATES OF AMERICA; JOHN DOE WRAY, Customs Supervisor; ADELE CORP, as heir of the Estate of Brian Corp, and CRYDERMAN AIR SERVICE, INC., Respondents

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM ON CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES OF AMERICA; JOHN DOE WRAY, Customs Supervisor; ADELE CORP, as heir of the Estate of Brian Corp, and CRYDERMAN AIR SERVICE, INC., Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

As is to be expected, the Petition of the Solicitor General in No. 81-1062, United States v. Eight Thousand Eight Hundred Fifty Dollars ($8,850.00) has established, with far more eloquence and precision than could we, how divided the circuits are on the issues presented in that case and in this case. This Court, by granting certiorari in No. 81-1062, has agreed that those issues should be resolved.

The first issue in our Petition is precisely that phrased by the first issue of the Government in No. 81-1062, and it fairly includes the other three

questions presented in that case as subsidiary questions. The statutes involved in these two cases are the same. The arguments raised by the Solicitor General, as to whether delay by the Government is acceptable because of the pendancy of administrative remission procedures, or criminal prosecution; of whether prejudice need be shown; and whether dismissal may be predicated solely upon governmental delay, were all raised by Petitioner in the Courts below. Indeed, that very case was urged upon the Sixth Circuit, unsuccessfully. A more clear cut situation could hardly be found for at least holding this case, pending resolution of No. 81-1062.

We think, however, that the Court's resolution of these issues would be more usefully and completely resolved with the added record of this case, which presents these forfeiture issues from a somewhat different perspective, and with additional development of the issues, than exists in United States v. Eight Thousand Eight Hundred Fifty Dollars ($8,850.00).

There are four reasons why this case should be granted and considered together with No. 81-1062:

1. Although Zaragoza argued below that prejudice was irrelevant to a finding of a due process violation, he argued in the alternative that the Government's delay had prejudiced his ability to contest the forfeiture (as well as his "Calero-Toledo" defense) by Corp's intervening death. He argued that it had also prejudiced his ability to resort to other collateral securing his loan, which he would have been prompted to do, had he immediately learned that the Government would forfeit the aircraft in which he had a chattel mortgage. A decision by this Court on whether prejudice is an essential element of the due process violation would be better developed if a case involving actual prejudice is considered.

The Government makes the novel contention that Petitioner's due process claim would not be affected by a decision in No. 81-1062 "because Petitioner's failure to come forward in a timely fashion adequately explains the delay in this case" (Brief, p. 5). Petitioner, of course, did not learn of the seizure until the late spring of 1978, at which time he did indeed come forward by recording with the FAA and by filing his petition for remission. More to the point,

however, the Government does not attempt to explain, nor did the Courts below express any reason, why this should somehow excuse the fact that the Government delayed in filing forfeiture proceedings in court. While the Government did contend that Petitioner's failure to record his chattel mortgage affected his standing,[1] the Government never has contended so far as we know that its delay was excused either by Zaragoza's failure promptly to file a petition for remission, or his failure immediately to have recorded his chattel mortgage in 1977.

2. Indeed, the second reason this case should be granted and considered together with No. 81-1062 is that it clearly raises the questions of whether the Government should be required to explain why it waited so long to file forfeiture proceedings. In this case, the trial court never required the Government to prove why the delay was so long, and simply hypothesized from counsel's legal memoranda that it may have had something to do with pendancy of criminal prosecution or administrative remission proceedings.

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1 Erroneously, see p. 9, infra.

Interestingly, however, the Government did not wait until Zaragoza's remission petition had been finally ruled upon before it ended its long delay and filed these proceedings. Promptly after Petitioner filed his foreclosure action in the Arizona court,[2] the Government brought these forfeiture proceedings, without waiting for the administrative review to be exhausted. As a matter of fact, six months later, Zaragoza's petition was still waiting for Government action.[3]

Petitioner argued below that the Government should have been required to explain why it delayed so long, and again it would seem that this Court's decision would be more helpful to the lower courts if it addressed the "burden of proof" issue raised here and discussed by Judge Alarcon in his dissent to United States v. Eight Thousand Eight Hundred Fifty Dollars ($8,850.00), on a record which places that issue sharply at issue. This record also provides

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2 The Government mistakenly indicates that Petitioner's action was filed after the forfeiture proceedings (Pet. App. 67).

3 See transcript of proceedings, January 5, 1979, in connection with Government's Motion to Dismiss before the Western District of Tennessee, pp. 19, 21.

illuminating facts bearing upon the Government's contention that the administrative remission procedures, which as our Petition notes are completely discretionary and non-reviewable by the courts, should be allowed to completely excuse the prompt filing of court forfeiture proceedings, a requirement imposed by most of the Circuits as a matter of statutory and Fifth Amendment due process law.

3. This case is brought on behalf of a completely innocent third party, found by the lower courts to be so, and the balancing of administrative convenience in processing forfeitures and remission proceedings should be examined from the perspective of the innocent property holder as well as the presumptively guilty person as painted by the Government in its presention of No. 81-1062, where the claimant had been convicted of the criminal offense causing the forfeiture. It may be acceptable to delay forfeiture proceedings as against a person who is being criminally charged, during the pendancy of those criminal proceedings. It would seem less logical to do so, however, once it is realized that other, innocent persons may have an interest in the property. Given

the in rem nature of forfeiture proceedings, simply the timely filing of such an action can be presumed to come to the attention of such innocent persons, even if they have not filed with Federal recording authorities the Government's claim to forfeit the property.

4. Finally, one more aspect of this case makes it a good complement to No. 81-1062, particularly with respect to whether dismissal is an appropriate remedy and whether prejudice ought to be required as part of the establishment of a violation of Fifth Amendment due process because of Governmental delay. The Government noted in its petition in No. 81-1062, that perhaps the remedy of dismissal would be appropriate in the situation where the claimant could show a significant factual issue and that the delay, through no fault of his own, injured his ability to defend the civil forfeiture action.[4]

We think this case presents just such a situation for this Court's consideration, inasmuch as the defense of uninvolvement and diligence, suggested by

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[4] Petition for Writ of Certiorari, United States of America v. Eight Thousand Eight Hundred Fifty Dollars ($8,850.00) in United States Currency, No. 81-1062, p. 24, fn. 25.

this Court in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), is presented here, and Zaragoza's presentation of the defense was prejudiced by the intervening death of Brian Corp. Corp's testimony would have been relevant to the question of whether Zaragoza was aware of any illegal use, and whether he had done all that this Court suggested in Calero-Toledo he ought to, by way of assuring himself that Corp's use of his collateral would not violate any laws justifying a forfeiture.

The Government belittles the Calero-Toledo issue, resting primarily upon two misperceptions of the record. In its Brief, p. 6, the Government contends that the District Court had found that "Petitioner's son had been seriously involved with drugs". There was no such finding, nor could there have been, inasmuch as the only evidence on the subject was that Petitioner's son, while a high school student, had been implicated but fully cleared of a marijuana offense (Pet. App. 128). Furthermore, the Government notes that Petitioner never inquired about the plane even after he learned that Corp allegedly had been violating the narcotics laws. While such is

indeed true, Petitioner's knowledge that Corp had been implicated in violating the narcotics laws occurred only after the aircraft was seized. Recognizing that, the relevance of such knowledge to the Calero-Toledo issue evaporates.

The facts as found by the District Court should be applied by this Court in a decision establishing whether or not the statements made in Calero-Toledo would indeed provide a defense to forfeiture and whether the facts of this case comply with such an exception.

Finally, the Government contends that Petitioner lacks standing to challenge the forfeiture, on the ground that the Government's right to forfeit was perfected at the time of seizure, and that Petitioner's chattel mortgage interest had not been recorded with the FAA until thereafter. Thus, says the Government (Brief, p. 5, fn. 5) the seizure voided property interests "arising in the interim" but Zaragoza's interest was found by the District Court to have previously been in effect (Pet. App. A-103). Thus, although the issue of standing is not before this Court, not having been dealt with by the Court of

Appeals[5] Zaragoza's standing is clear. If the Government was entitled to forfeit the aircraft, Zaragoza's interest is extinguished whether perfected or not. If the Government was not entitled to forfeit the aircraft, the Government had no further interest in the aircraft and Zaragoza was free to pursue his foreclosure against his borrower.

For these reasons the Petition ought to be granted.

Respectfully submitted this 11th day of May, 1982.

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[5] E.g., Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132 (1975).